UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

STATE OF MISSOURI ex rel.)
Attorney General Chris Koster et al.,)
)
Plaintiff,)
)
v.) Case No. 4:15CV01506
)
REPUBLIC SERVICES, INC., et al.,)
)
Defendants.)

SUGGESTIONS IN SUPPORT
OF PLAINTIFF'S MOTION FOR REMAND,
COSTS, ATTORNEYS' FEES, AND SANCTIONS

Respectfully submitted,

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INTRODUCTION

Missouri's First Amended Petition asserts no federal claims on its face, and none of its state-law claims is preempted by federal law. Nonetheless, Defendants[1] removed this action from state court, asserting that the State's September 2, 2015 expert reports "expanded the injunctive relief [Missouri] seeks" to include new remedies that "interfere[] with EPA's remedial plans underway at the Bridgeton Landfill pursuant to the Comprehensive Environmental Response, Compensation and Liability, 42 U.S.C. § 9601 *et seq*. ('CERCLA')." Defendants' Notice of Removal ("Notice") [Docket No. 1], ¶4. Though Missouri has not prayed for any of these allegedly "federal" remedies, Defendants insist the State "artfully pleaded the First Amended Petition to obfuscate mention of a federal question even though Plaintiff is, in fact, seeking relief arising under federal law and which can only be evaluated by this Court." *Id.* ¶23.

Defendants' Notice of Removal has no merit. Tellingly, Defendants do not identify even a single sentence in Missouri's expert reports demanding some specific injunctive relief. Nor do they explain how such relief would "interfere" with any CERCLA remediation of the Superfund Site planned by EPA. Defendants also fail to disclose the many motions, discovery papers,

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[1] Defendants are Republic Services, Inc.; Allied Services LLC, d/b/a Republic Services of Bridgeton; and the Bridgeton Sanitary Landfill, LLC.

and Agreed Orders served or entered long before September 2, 2015, that specifically address the three issues Defendants now claim were raised *for the first time* in Missouri's expert reports.

Defendants fail to establish any basis for this Court to assume subject-matter jurisdiction over exclusively state-law claims between non-diverse parties. But even assuming that the State has "expanded the injunctive relief it seeks" beyond what it prayed for in its First Amended Petition and that its "now-sought relief" raises significant federal questions, Missouri's expert reports are hardly Defendants' first notice of the State's interest in preventing (A) the Bridgeton Landfill's subsurface fire from reaching the Radiologically Impacted Materials ("RIM") within the West Lake Landfill, or (B) further contamination of the surrounding groundwater. Whatever right of removal Defendants may once have had based on these issues was waived long before October 1, 2015.

In either event, this case should be remanded to state court, and Missouri should be awarded its costs and attorneys' fees under 28 U.S.C. § 1447(c) because Defendants' purported basis for removal was not objectively reasonable.

FACTUAL BACKGROUND

This case concerns an uncontrolled, underground trash fire—what Defendants refer to as a "subsurface smoldering event" or "SSE"—at the Bridgeton Sanitary Landfill in north St. Louis County. The Bridgeton Landfill is part of the "West Lake Landfill Superfund Site" owned and operated by the Defendants. Designated as "Operable Unit 2" (OU-2) of the Superfund site, the Bridgeton Landfill is an unlined rock quarry filled with residential, commercial, and other waste. "Operable Unit 1" (OU-1), which adjoins the Bridgeton Landfill to the north, contains industrial waste and a significant volume of illegally deposited radioactive material left over from the Manhattan Project.

In December 2010, Defendants informed the Department of elevated temperatures within landfill gas extraction wells in the Bridgeton Landfill, suggesting the existence of a subsurface smoldering event or fire. The subsurface fire has intensified over the last five years, as evidenced by rapid surface settlement over an enlarging area, increased odors, concerning changes in the composition of landfill gas, increased production of leachate, and elevated temperatures. The State has received complaints from nearby residents and businesses since at least July 2012 that the odors coming from Bridgeton undermine the quality of life for people living and working near the landfill.

Since January 2011, the subsurface fire has increased the volume of leachate—liquid that has contacted waste—generated within the landfill to more than 150,000 gallons per day. This leachate travels through and overflows the limestone rock that makes up the old quarry's floor and walls, vitiating the surrounding groundwater. On at least one occasion in February 2013, black leachate escaped onto the surface and flowed into a nearby forested area and an intermittent stream.

On March 27, 2013, the State of Missouri filed a Petition against Defendants in the Circuit Court of St. Louis County, State of Missouri, alleging violations of the Missouri Solid Waste Management, Clean Water, Air Conservation, and Hazardous Waste Management Laws as well as claims for nuisance, cost recovery and natural resource damages. The State amended its Petition on October 21, 2014, alleging three additional counts, agency liability, and veil piercing; demanded punitive damages; and requested a trial by jury.

On October 1, 2015, Defendants removed the action to federal court.

ARGUMENT

I. Defendants' Notice of Removal is untimely.

To remove an action from state to federal court under 28 U.S.C. § 1446, "a defendant must file a notice of removal within 30 days of one of the statute's triggering events." *Dalton v. Walgreen Co.*, 721 F.3d 492, 493 (8th Cir. 2013). If the pleading is removable on its face, the defendant has 30 days from receipt of the initial pleading. 28 U.S.C. § 1446(b)(1). Otherwise, the defendant must file his notice of removal "within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper *from which it may first be ascertained* that the case is one which is or has become removable." *Id.* § 1446(b)(3); *Dalton*, 721 F.3d at 493.

"The 1446(b) time limit, while not jurisdictional, is mandatory, and a timely motion to remand for failure to observe the thirty-day limit will be granted." *Johnson v. Lou Fusz Auto. Network, Inc.*, No. 4:14CV1720 JCH, 2014 WL 7338820, at *3 (E.D. Mo. Dec. 22, 2014); *see also Johnson v. Wyeth*, 2012 WL 1829868, at *3 (E.D. Mo. May 18, 2012); *McHugh v. Physicians Health Plan of Greater St. Louis, Inc.*, 953 F. Supp. 296, 299 (E.D. Mo. 1997); *St. Louis Home Insulators v. Burroughs Corp.*, 597 F. Supp. 98, 99 (E.D. Mo. 1984). "[T]he removal clock is triggered when the facts which would make the case removable are established and ascertainable (as opposed to

ascertained)." *Tabor v. Willey*, 2001 WL 34152085, *3 (N.D. Iowa May 3, 2001). "[A] defendant who fails to remove within the thirty-day period waives the right to remove at a later time." *Id.* "[S]ubsequent events do not make it 'more removable' or 'again removable.' " *Black v. Brown & Williamson Tobacco Corp.*, No. 4:05CV01544 ERW, 2006 WL 744414, at *3 (E.D. Mo. Mar. 17, 2006).

Defendants filed their Notice of Removal on October 1, 2015, claiming to have first ascertained a removable federal issue in the State's September 2, 2015 expert reports which, allegedly, "for the first time, explicitly disclosed that [Missouri] intends to assert control over radiologically impacted materials ('RIM') allegedly found at the Bridgeton Landfill, propose the construction of an isolation barrier at the Bridgeton Landfill as a protective measure, and compel action on groundwater at the Bridgeton Landfill." Notice ¶4. For Defendants' Notice to be timely under 28 U.S.C. § 1446(b)(3), these three issues cannot have been ascertainable until September 1, 2015 or later. If *even one* of them was ascertainable at any time on or before August 30, 2015, however, then Defendants' Notice of Removal was untimely, and remand to state court is mandatory under § 1446(b)(3). *Dalton*, 721 F.3d at 493.

As the State will show in Part II of this Motion below, none of the issues raised in Defendants' Notice of Removal presents a "significant federal issue" sufficient to establish Article III jurisdiction. But the Court need not even reach that issue unless Defendants' Notice of Removal was timely. Thus, the threshold question for this Court is *when* each of the three issues identified in Defendants' removal papers was *first capable of ascertainment*.

A. Any federal issues arising out of Missouri's interest in radiologically impacted materials or the construction of an isolation barrier were *first ascertainable* as early as May 13, 2013 and no later than January 9, 2015.

Defendants have represented to this Court that Missouri disclosed *for the first time* in its September 2, 2015 expert reports that the State *intends* (1) to "assert control over radiologically impacted materials ('RIM') allegedly found at the Bridgeton Landfill," and (2) to "propose the construction of an isolation barrier at the Bridgeton Landfill." Notice ¶4. They argue that the State's "now-requested relief interferes with EPA's remedial plans underway at the Bridgeton Landfill pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9601 *et seq.* ('CERCLA')," *id.*, and "impinge[s] on EPA's exclusive consideration of whether to construct an isolation barrier between radiological waste and non-radiological waste at the federal Superfund site." *Id.* ¶29. Assuming

Missouri's claims were ever removable on those grounds, Defendants waived their right to remove long before October 1, 2015.

RIM was an issue in this litigation *at least two years before Defendants filed their Notice of Removal*. On May 13, 2013, just four months after Missouri filed its original Petition, the parties stipulated to the state court's First Agreed Order of Preliminary Injunction, under which Defendants *agreed* to submit for the Department's approval within 75 days a North Quarry Contingency Plan ("NQCP"), which "shall include:... Establishment of trigger criteria for *an isolation break between the North Quarry and radiological materials contained* in West Lake Landfill Site OU-1 Area 1, along with a plan and schedule for such break if triggered." Ex. A at 12-13 (emphasis added). Defendants submitted their 316-page NQCP for the State's approval on July 26, 2013.

In the introduction to the NQCP, Defendants acknowledge that "[t]he Plan and its requirements will be *part of the Bridgeton Landfill closure and post closure operations,*" the oversight of which has been delegated to the State of Missouri by EPA. Ex. B at 2 (emphasis added). Noting that any physical barrier between the Bridgeton subsurface fire and the RIM in the adjacent OU-1 of the West Lake Landfill "will be placed in an area of *joint jurisdiction*," the Plan also discusses a number of steps that must be taken before its construction:

> It is important to *confirm at this stage the absence of radiological impact at the proposed barrier location* so that detailed construction plans and timelines may be developed in order to allow for efficient execution of the Isolation Barrier Construction Plan, if triggered. The GCPT Work Plan is being *submitted for both MDNR and EPA review in order to ensure that activities comply with appropriate requirements of both agencies given the shared jurisdiction*.

Id. at 6 (emphasis added). In its more detailed appendices, the NQCP specifically acknowledges that the State's intent is:

> *to prevent the SSE from advancing into the radiologically-impacted material* in West Lake OU-1 Area 1. Specifically, Bridgeton Landfill [has] evaluated the excavation of waste to create an isolation barrier south of the southern limit of radiologically-impacted material. Such an approach would also limit the volume of waste excavation, consistent with concerns raised by the Lambert-St. Louis International Airport Authority. Finally the relative speed of construction, about three months, allows such a system to be implemented quickly. This isolation barrier would provide the physical barrier *that Missouri Department of Natural Resources (MDNR) has requested*.

Ex. B at 197] (emphasis added). To the extent Missouri's interest in preventing the subsurface fire from reaching RIM can be said to raise a "significant federal issue" justifying removal under 28 U.S.C. § 1441, *that* issue has been ascertainable at least since the state court entered its First Agreed Order on July 26, 2013.

The role of RIM in Missouri's state-law claims was further ascertainable in January 2014, when the State filed its Application for

Further Relief Under the First Agreed Order of Preliminary Injunction.

Indeed, Missouri's interest in RIM could not have been more explicit:

> The State is additionally concerned about the management of the Bridgeton Sanitary Landfill in relation to the adjacent West Lake Landfill, Operable Unit 1 ("OU 1"), which is listed on the federal Superfund National Priorities List, and *which contains radiologically contaminated cells*.
>
> Specifically, recent analysis of OU1, provided by US EPA on November 25, 2013, suggested the presence of higher-than-background-level radioactivity at depth outside the area where previous maps represented the radioactive material was located. This suggests that *radiologically-impacted material may be closer to the border between OU1 and the North Quarry than had been previously thought*.
>
> Despite the responsible parties' ongoing exploration of the extent of the radiological contamination, the uncertainty of where the radiologically-impacted material is located, and its proximity to the North Quarry, increases the possible interaction between the SSE and radiologically-impacted materials. Carbon monoxide data is a critical component to understanding any potential interaction between the radiologically-impacted material in OU-1, and the Bridgeton Sanitary Landfill *and is therefore vital to the State's efforts to protect the public from any risks associated with OU-1.*

Ex. C at 6-7, ¶¶18-20 (emphasis added).

Missouri's RIM-related concerns cannot have escaped Defendants' notice. In the state court's January 17, 2014 Stipulation and Order, Defendants agreed to "submit to the Department of Natural Resources ... comprehensive carbon monoxide data for all active gas extraction wells located in the North Quarry, including the 'neck' area of the Bridgeton

Sanitary Landfill." Ex. D at 2. To the extent the "State's efforts to protect the public from any risks associated with OU-1" form the basis of Defendants' October 1, 2015 Notice of Removal, those efforts were *ascertainable 22 months earlier* from Missouri's First Application for Further Relief on January 2014.

RIM was explicitly discussed in the First Amended Petition, filed on October 10, 2014, in which the State alleged that both the West Lake and Bridgeton Landfills "contain[] radiologically impacted materials, radioactive materials and/or materials that emit radiation." First Amended Petition [Docket #18] ¶¶14-15. More importantly, Missouri alleged specific reasons why the presence of radioactive waste in both landfills is relevant to its claims in this case:

> As the owner/operator of a landfill such as the Bridgeton Sanitary Landfill, it is reasonably foreseeable that if immediate steps are not taken to isolate, contain, suppress, inhibit, and/or extinguish a subsurface smoldering event/fire, that the smoldering event/fire will likely spread throughout the landfill and intensify, causing the release of hazardous gases, contaminated leachate, noxious odors, groundwater pollution, and soil pollution, *in addition to the potential for off-site migration of radioactive or radiologically impacted materials and/or materials that emit radiation*.

Id. ¶50.

> Maintaining a landfill in a densely populated area containing hazardous substances and radioactive materials, and that is located immediately adjacent to a site containing radioactive

> waste creates a high degree of risk of harm to human health, property and the State's natural resources.

Id. ¶84.

> To date, Defendants have been unable, or have intentionally failed to eliminate the risk of the air, water, and ground pollution emanating from the Bridgeton Sanitary Landfill, in addition to the risk of the release of radioactive materials if the subsurface smoldering event/fire reaches radiologically impacted materials.

Id. ¶86. These facts regarding the presence of RIM or radioactive materials in the vicinity of the Bridgeton subsurface fire are directly relevant to establishing the breach(es) of Defendants' statutory and common-law duties of care, the extent of the State's damages, and the causal connections between them. Any right Defendants might have had to remove based on these facts expired on November 9, 2014—30 days after Missouri filed its First Amended Petition.

At the absolute latest, Missouri's concerns about RIM contamination were ascertainable by Defendants on January 9, 2015, when the State moved to preserve core samples from new wells Defendants were drilling. As explained in its motion, "the State's consultants need access to these core samples to analyze and characterize the subsurface conditions, the progress of the fire, and the presence of any radiologically impacted material (RIM)." Ex. E ¶13. The State attached an affidavit from Todd Thalhamer—one of the

experts whose reports were disclosed to Defendants on September 2, 2015—explaining why Missouri needed the core samples:

> *Due to the presence of RIM*, and in order to track the progression of the subsurface fire or the presence of a new fire in the North Quarry, it is essential from an engineering standpoint to know exactly what conditions are occurring on a frequent basis, in the North Quarry....
>
> Without this data, the [State] will lack the information necessary to timely inform the community whether a fire may impact the RIM, *and curtail the ability to plan and/or mitigate the possibility of off-side migration of RIM*.

Ex. F ¶¶15-16 (emphasis added).

In their Response in Opposition, Defendants made the following, now strikingly familiar, argument:

> The State lacks authority ... with respect to the radioactive impacted materials (RIM) at the site. ***The State's thinly veiled attempt to usurp US EPA's authority over the West Lake Landfill should be denied, or addressed as the federal question that it raises*** by the agency or, if appropriate, judge with jurisdiction over such issues.

Ex. G at 3. Noting EPA's "exclusive jurisdiction over all the RIM and any actions to be taken in connection therewith," Defendants asserted that "any directive from this [state] Court regarding RIM runs a serious risk of interfering with the USEPA's efforts at the site." *Id.* at 13. "Therefore, the Court must decline the State's request to order Bridgeton Landfill to take samples for the purpose of identifying the extent of RIM, *because such a*

lawsuit, if possible at all, plainly is a CERCLA-related claim subject to exclusive federal court jurisdiction." *Id.* at 14 (emphasis added).

If Missouri's interest in RIM and the potential construction of an isolation barrier can be construed as a challenge to CERCLA, Defendants could have—in fact, had—ascertained as much by November 23, 2014, when they raised the following affirmative defense in their Answers to the State's First Amended Petition:

> Plaintiff's request for injunctive relief is *preempted as it attempts to shape and therefore challenge the remedy already underway under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9604, and violates the timing of review provisions thereunder, 42 U.S.C. § 9613(h)*.

Ex. H at 17 (emphasis added). Their Notice of Removal is therefore untimely, and this case should be remanded to state court.

B. The State's interest in compensation for past ground water contamination and the prevention of additional groundwater contamination was ascertainable as early as March 27, 2013 and no later than August 21, 2015.

Defendants claim Missouri's September 2, 2015 expert reports disclosed *for the first time* that the State "seeks to usurp EPA's jurisdiction over groundwater at the federal Superfund site and challenge the ongoing CERCLA cleanup." Notice ¶32. In fact, the State's interest in preventing further contamination of its groundwater has been ascertainable since the case was filed. In its original Petition, filed on March 27, 2013, the State

alleged the following facts concerning Defendants' pollution of Missouri's groundwater:

> "Leachate from the Bridgeton Sanitary Landfill is a 'water contaminant' as that term is defined in § 644.016(23) RSMo." Ex. I ¶26.
>
> "The Bridgeton Sanitary Landfill is a 'water contaminant source' or 'point source,' as those terms are defined by § 644.016(24) and (15) RSMo." *Id*. ¶27.
>
> "Surface water and groundwater surrounding the Bridgeton Sanitary Landfill are 'waters of the state' as that term is defined by § 644.016." Id. ¶28.
>
> "Leachate is collecting in the subsurface of the landfill, traveling into the limestone rock that makes up the bed of the landfill, and flowing in to the groundwater." Id. ¶56.
>
> "Under § 260.210(5) RSMo, the State may recover cleanup costs whenever it determines that a person has benefitted financially from dumping solid waste into waters of the state." Id. ¶73.
>
> "the State has a cause of action for damages against any person violating the provisions of §§ 644.006 to 644.141 RSMo, including ... the costs and expenses of restoring any waters of the state to their condition as they existed before the violation, sustained by it because of the violation." Id. ¶74.
>
> "Since at least November 2012, Defendants have permitted or allowed landfill leachate to flow from the Bridgeton Sanitary Landfill into the groundwater or onto the surface of the ground where it was reasonably certain to cause pollution to surface or subsurface waters of the state in violation of § 644.051.1(1) RSMo." Id. ¶76.

Based on these allegations, the State sought civil penalties, natural resource damages, and equitable relief requiring Defendants to develop plans to

prevent the further flow of leachate out of the Bridgeton Sanitary Landfill. *Id.* at 15.

On May 13, 2013, the state court entered the First Agreed Order, which required Defendants to "[c]ontinue the performance of groundwater monitoring, including preparation of the groundwater assessment and investigation plan," and to "conduct off-site groundwater monitoring and assessment if and to the extent required by the Missouri Solid Waste Management Law." Ex. A at 16, ¶32.

On August 6, 2013, the State asked Defendants to "Identify ... each and every person ... who has or had responsibility for monitoring and reporting on the Bridgeton Landfill's *groundwater monitoring program at any time during the last five years.*" Ex. J, No. 38 (emphasis added).

On June 4, 2014, Missouri asked the state court to order Defendants to pay the State's oversight costs ***under CERCLA*** because EPA had delegated responsibility for remediating the Bridgeton Landfill portion of the West Lake Landfill Superfund Site to Missouri in its July 2008 Record of Decision. Ex. K at 17-18. In that application, Missouri specifically alleged that Defendants had polluted the State's groundwater with benzene, among other contaminants:

> The landfill's monitoring wells have shown violations of the State's groundwater quality standards for arsenic, benzene, toluene, and 1,2-Dichloroethane. In the case of benzene,

> these violations are not mere excursions but are hundreds of times greater than the groundwater quality standard for benzene of 5 µg/L (micrograms per liter.)

Id. at 4

On November 14, 2014, the State served requests for production seeking the following documents:

> Copies of policy and procedures manuals related to all aspects of the management and operation of the landfill in effect from January 1, 2005 through the present, including but not limited to the systems related to gas, leachate, *groundwater* and the cover(s) and cap(s).
>
> Copies of all design, construction, installation, operation and maintenance documents for *all groundwater wells on the Westlake Landfill Superfund Site*.
>
> Copies of all raw data, summary reports, reports, graphical presentations, lab results, or any other results including, but not limited to, carbon monoxide, carbon dioxide, hydrogen, nitrogen, oxygen, methane, temperature, benzene, radiological constituents including but not limited to thorium, radium, uranium, and any daughter products such as radon, positive and negative pressure readings collected from ... *groundwater wells*, and any well or probe at the landfill from January 1, 2005 to the present.
>
> Copies of all data and records regarding the locations of groundwater monitoring wells and groundwater level at the landfill.

See Ex. L, Nos. 37, 44, 46, and 69 (emphasis added).

In April 2015, the State's shallow groundwater experts—accompanied by Defendants' employees and consultants who received split samples—took tree core samples from the Bridgeton and West Lake Landfills and surrounding public and private lands. On August 17-21, 2015, Missouri's

deep groundwater experts—also accompanied by Defendants' employees and consultants who received split samples—took samples from Defendants' wells within the Bridgeton Landfill and five state-owned wells surrounding the property.

As this partial chronology demonstrates, Defendants have been on notice that Missouri is seeking compensation for past groundwater contamination and protection against future groundwater contamination since they were served with the State's original petition on March 27, 2013. Any right Defendants may have once had to remove Missouri's groundwater claims to federal court was waived more than two years ago. Their Notice of Removal is therefore untimely, and this case should be remanded to state court.[2]

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[2] Defendants represented to this Court that the "federal issues" on which they removed this action from state court were "neither established nor ascertainable prior to service of [Missouri's] Expert Reports" on September 2, 2015. Notice ¶14. As demonstrated in this Motion, however, the three issues they cite in their removal papers were not only ascertain*able* but *were in fact ascertained* by Defendants months if not years earlier. *See, e.g.*, Ex. G at 3 ("The State's thinly veiled *attempt to usurp US EPA's authority* ... should be ... addressed as *the federal question that it raises* by the ... judge with jurisdiction over such issues.")(emphasis added).

As Defendants' removal to federal court *more than two years into litigation* appears calculated to scuttle the parties' longstanding March 6, 2016 trial setting in state court, sanctions may be appropriate. *See* 28 U.S.C. § 1446(a) ("defendants ... shall file ... a notice of removal *signed pursuant to Rule 11* of the Federal Rules of Civil Procedure").

II. Defendants have not established any basis for this Court to exercise subject-matter jurisdiction over Missouri's state-law claims.

"A defendant may remove a state law claim to federal court only if the action originally could have been filed there." *Baker v. Martin Marietta Materials, Inc.*, 745 F.3d 919, 923 (8th Cir. 2014)(internal quotations omitted). "[T]he party seeking removal has the burden to establish federal subject matter jurisdiction, [and] all doubts about federal jurisdiction must be resolved in favor of remand." *Id.* "Removal based on federal question jurisdiction is governed by the well pleaded complaint rule: jurisdiction is established only if a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Id.*

The well-pleaded complaint rule "makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams,* 482 U.S. 386, 392 (1987); *see also Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 809, n. 6 (1986) ("Jurisdiction may not be sustained on a theory that the plaintiff has not advanced"); *Great North R. Co. v. Alexander*, 246 U.S. 276, 282 (1918) ("[T]he plaintiff may by the allegations of his complaint determine the status with respect to removability of a case"). Thus,

> a defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated. If a defendant could do so, the plaintiff would be master of nothing. Congress has long since decided that federal defenses do not provide a basis for removal.

Caterpillar, 482 U.S. at 399 (1987). "It is firmly established that a federal defense, including a preemption defense, does not provide a basis for removal, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue in the case." *Baker*, 745 F.3d at 924.

The Supreme Court has identified only two exceptions to the well-pleaded complaint rule. The first is sometimes called the "complete preemption doctrine," which "converts an ordinary state-law claim into a federal claim where 'the pre-emptive force of a statute is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Gore v. Trans World Airlines*, 210 F.3d 944, 949 (8th Cir. 2000)(quoting *Caterpillar*, 482 U.S. at 393). The second exception applies to state-law claims that, while not preempted by federal law, nonetheless implicate "significant federal issues." *Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005). "There is no single, precise, all-embracing test for jurisdiction over federal issues embedded in state-law claims between nondiverse parties."

Baker, 745 F.3d at 924. "Instead, the question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Id.*

A. Missouri is not seeking "control over RIM."

In their first attempt to identify a "significant federal issue" justifying removal, Defendants claim the State's expert reports "clarify Plaintiff's sought-after relief and show Plaintiff is attempting *to usurp control over RIM* allegedly found at the Bridgeton Landfill." Removal Notice ¶24 (emphasis added). Yet, Defendants never identify what "sought-after relief" they are referring to; nor do they explain how that relief "usurps control over RIM." Instead, they assert that the State's experts "specifically address RIM," *id.* ¶25; ". . . conclude that RIM is found in vegetation around the federal Superfund site," *id.*; ". . . suggest that the Superfund site is the source of migration," *id.*; ". . . discuss radiological waste at length," *id.* ¶26; and ". . . hypothesize that the subsurface reaction will reach RIM," *id*. Based on nothing more than these vague characterizations, Defendants conclude that the State's "Report seeks new relief not requested in the Petition and illustrates Plaintiff's attempts to take RIM away from EPA's jurisdiction." *Id.* ¶26. If that were true, one would expect Defendants to identify the specific "new relief" related to RIM they contend the State is now seeking—*or at least*

cite the page in the State's expert reports where that relief is discussed. *Id.* ¶24. Defendants do neither in their Notice of Removal.

Instead, they cite *generally* a press release[3] in which the Attorney General's Office disclosed the State's expert reports to the public. Defendants claim this press release will remove "any doubt that Plaintiff is trying to exert control over matters turning exclusively on questions of federal law." *Id.* ¶ 27. But even here, Defendants fail to cite *any specific text* from the press release other than its headline, and it remains unclear just how this document supports Defendants' removal argument. The press release says nothing about any injunctive relief related to RIM. Nor does it indicate any effort by Missouri to *usurp control over RIM*. On the contrary, the press release explicitly states:

> the Attorney General's Office forwarded copies to the Environmental Protection Agency, the Missouri Department of Natural Resources, the Missouri Department of Health and Senior Services, and the St. Louis County Public Health Department. *Koster encouraged those agencies to carefully review the information in the reports and take further remedial action as appropriate to ensure that the people around the landfill are protected*.

Notice Exhibit 12 (emphasis added).

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[3] Defendants provide no authority holding that a press release may qualify as "other paper" under 28 U.S.C. § 1446(b)(3).

Contrary to defendants' assertions, the State's experts' reports do not "conclude that RIM is found in vegetation around the federal Superfund site and suggest that the Superfund site is the source of migration." Dr. Joel Burken's report, titled "West Lake Landfill Organic Pollutant Phytoforensic Assessment" makes no reference to or recommendation regarding RIM. Indeed, the only reference possibly related to the overall issue of radiological contamination states simply that "historical data from the site was evaluated and plant sampling was conducted in the WLL area for target pollutants that are typical from landfill operations and for radionuclides." (Notice Exhibit 9 at Burken-0000048). Dr. Shoaib Usman's report, titled "Report on Westlake Landfill Phytoforensic Assessment using Gamma Spectroscopy" concludes that the "data shows pockets or clusters of elevated radioactivity in the tree samples. Two of the four clusters are in close proximity of the known Radiological areas but two other sites appear to contain radioactive material in the tree core [and] these locations are not in close proximity [to] the radiological areas suggesting possible movement of the material. Detailed investigation is recommended for thorough understanding of the source and transport mechanism of the radioactive material at the site." (Notice Exhibit 10 at Usman-0000023).

Missouri did not sue Defendants over RIM contamination in or around the Bridgeton Landfill. Nor did the State pray for any injunctive relief related

to RIM, the remediation of which falls within the exclusive jurisdiction of federal regulators. Nevertheless, the presence of RIM is relevant to establishing Defendants' liability for negligence, strict liability, nuisance and other state-law claims in at least two ways. First, the presence of RIM in the trees and groundwater surrounding Bridgeton goes to causation. If unique radioactive materials that can only have come from Defendants' property are found in the trees and groundwater beyond the landfill's boundaries, then the other volatile organic compounds found in those trees and groundwater likely came from Defendants' property as well. Second, the Bridgeton Landfill's proximity to (or actual contamination with) RIM is directly relevant to the reasonableness of Defendants' response to the subsurface fire.

Regardless of whether or when EPA takes action to remediate RIM within or without the West Lake Landfill Superfund Site, Missouri is entitled to compensation under state law for all the *non-radioactive* pollutants released into the environment by Defendants' negligent conduct. It defies reason that Defendants could avoid state-law liability for polluting Missouri's groundwater with benzene and other volatile organic compounds simply because they polluted that same groundwater with radioactive materials as well.

B. None of the State's expert reports raises a "CERCLA challenge."

The reports of the State's experts Sperling and Abedini do not support Defendants' allegations in Paragraphs 26 and 30 that the State "demands that a barrier to isolate OU-1 from the remainder of the federal Superfund site be constructed immediately" in furtherance of its "attempts to take RIM away from EPA's jurisdiction." Drs. Sperling and Abedini do caution that the self-sustaining subsurface exothermic reaction "has passed beyond both lines of GIW wells at the 'neck' [and that] with the reaction moving closer to the North Quarry there exists only a very limited window to take further action to prevent the [reaction] from once again escalating out of control and causing additional hardship on the community of Bridgeton...[and]to the OU-1 radiological area." (Notice Exhibit 11 at Sperling/Abedini-0000111). Drs. Sperling and Abedini then recommend that "it would be prudent to establish a physical barrier between the North Quarry and OU-1...particularly given such a project seems relatively straightforward given the shallow waste thickness in the area." (Notice Exhibit 9 at Sperling/Abedini-0000113).

Regarding the waters of the State of Missouri, the State remains respectful of the division of jurisdiction between it and the federal authorities. Indeed, the State awaits a decision on its *Touhy* request for the expert testimony of the author of the December 17, 2014 United States Geological Survey report prepared for the EPA and titled "Background Groundwater Quality, Review of 2012-2014 Groundwater Data, and Potential

Origin of Radium at the West Lake Landfill Site, St. Louis County, Missouri." (Notice Exhibit 17). That report declares the EPA's "primary concern" to be "the presence of combined radium above the maximum contaminant level...in samples from several monitoring wells at the WLL site and that these detections could be the result of migration from radiologically-impacted material (RIM) places in two areas at the WLL site." (Notice Exhibit 17 at 1). It is significant to the State that the USGS found groundwater contamination caused by landfill leachate, specifically finding that groundwater samples from 47 of the 83 on-site monitoring wells "are affected by landfill leachate...[and that] concentrations of dissolved combined radium were significantly higher...in samples from...wells affected by leachate compared to samples from monitoring wells at the site that do not have leachate effects." (Notice Exhibit 17 at 2) Of further concern to the State is the USGS' acknowledgement of the "uncertainty" in its then-ability to ascertain background concentrations of contamination because of the small set of data available to it from the few off-site groundwater wells located within five miles of the WLL site. (Notice Exhibit 17 at 1).

Thus, the State installed and sampled five new off-site groundwater monitoring wells, but not to "usurp EPA's jurisdiction over groundwater at the federal Superfund site," as alleged by Defendants in Paragraph 32.

Instead, the State sought to do what was within its authority and responsibility to do to determine the type and extent of Defendants' contamination of the waters of the State. One of the State's experts, Peter Price, analyzed the samples from the five new off-site wells along with historic and recent on-site groundwater samples "to determine if groundwater near the landfill has been impacted by the landfill operations." (Notice Exhibit 18 at Price-0000006). Mr. Price concluded, without making any particular recommendations, that "an inward hydraulic gradient has not been consistently maintained at the Bridgeton Sanitary Landfill as evidenced by detections of volatile organic compounds, representative of leachate from the landfill, in high concentrations in monitoring wells on the southwest side of the south quarry area and nearby monitoring wells on adjacent property, and by water levels in those wells that is consistent with a groundwater flow direction outward from the landfill." (Notice Exhibit 18 at Price-0000015) Dr. David Wronkiewicz, another of the State's experts, came to a consistent conclusion with Mr. Price, finding that "changing concentrations...have been observed in groundwater collected from different monitoring wells and at different sampling dates at the Bridgeton Sanitary Landfill." (Notice Exhibit 19 at Wronkiewicz-0000003) Dr. Wronkiewicz's recommendation is that samples of any type of liquid from the area that show increased sulfate

concentrations should also be screened for the presence of radium. (Notice Exhibit 19 at Wronkiewicz-0000005).

Thus, mindful of the USGS's stated concern over the small number of off-site groundwater wells from which to obtain data, and in response to its findings of contamination of waters of the State by landfill leachate, the State commissioned a "Feasibility Study Report, Groundwater Remediation, Bridgeton Landfill, St. Louis County, Missouri." (Notice Exhibit 16 at Hemmen-0000001). The Feasibility Study was carefully prepared in accordance with the EPA's "established seven primary criteria for evaluating remedial alternatives." (Notice Exhibit 16 at Hemmen-0000007) The stated purpose of the State's Feasibility Study is "to evaluate preliminary groundwater remedial alternatives and associated preliminary cost information." (Notice Exhibit 16 at Page Hemmen-0000009) The information presented in this report presents information about truly feasible methods of addressing Defendants' uncontroverted contamination of off-site waters of the State, and is thus useful to State and federal regulators as well as any finders of fact. No fair reading of this report results in a conclusion that it seeks to "commandeer EPA's jurisdiction" as alleged by Defendants at Paragraph 33 of the Notice; rather, it provides information previously unavailable to federal regulators.

III. The Court should award Plaintiff its actual costs, including attorneys' fees, because Defendants lacked an objectively reasonable basis for removal.

Upon remand, this Court may "require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). "The decision whether to award costs and fees under 28 U.S.C. § 1447(c) rests in the Court's discretion." *Gen. Credit Acceptance, Co., LLC v. Deaver,* No. 4:13CV00524 ERW, 2013 WL 2420392, at *6 (E.D. Mo. June 3, 2013). "In exercising discretion to make such an award, courts also weigh the statutory objective of providing a federal forum against the interest of avoiding removals sought solely for the purpose of prolonging litigation." *Missouri v. Webb*, No. 4:11CV1237 AGF, 2012 WL 1033414, at *5 (E.D. Mo. Mar. 27, 2012). "Bad faith or frivolousness is not required to support an award of fees and costs." *Id.*

The Supreme Court has held that attorneys' fees may be awarded "where the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140-41 (2005). "The process of removing a case to federal court and then having it remanded back to state court delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140-41 (2005). "Assessing costs and fees on remand reduces the

attractiveness of removal as a method for delaying litigation and imposing costs on the plaintiff." *Id.*

An award of costs and fees is warranted in this case. Not only have Defendants failed to identify an objectively reasonable basis for removal, the "federal issues" on which they rely were ascertainable at least nine months, and as much as two and a half years, earlier. Nonetheless, Defendants waited to remove until their state-court trial setting was less than six months away in a patently obvious effort to postpone trial. Their conduct warrants an award of fees and costs.

CONCLUSION

For the foregoing reasons, this matter should be remanded to state court and the State should be awarded its costs and fees.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of October, 2015 the foregoing Plaintiff's Motion for Remand, Costs and Attorneys' Fees was filed via the Court's e-filing system, which will automatically serve an electronic copy upon the following counsel of record. In addition, the undersigned certifies that he signed the original of the foregoing and will maintain it in the compliance with Rule 55.03.

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